CalHR Case Number 17-M-0010
Appeal of Transfer
Final Decision Adopted 7/11/2017
By: Richard Gillihan, Director

PROPOSED DECISION

This matter was heard before Karla Broussard-Boyd, Administrative Law Judge II (ALJ), Department of Human Resources (CalHR) at 9:00 a.m. on May 17, 2017 in Sacramento, California.

The appellant was present and represented by Jeffrey Hinrichsen, Attorney at Law, Oviedo Law Group, Inc., Attorneys and Counselors at Law. Jorge A. Leon, Attorney IV, California Department of Corrections and Rehabilitation (CDCR), California Correctional Health Care Services (CCHCS), represented CDCR, Folsom State Prison, CCHCS, respondent.

I

JURISDICTION

California Government Code sections 19994.1 and 19994.3 authorize CalHR to return an employee to his former position if an involuntary transfer failed to follow the statutory requirements of Government Code section 19994.1; or was the result of harassment or discipline in violation of Government Code section 19994.3.

On November 7, 2016, respondent, CDCR, Folsom State Prison, CCHCS, issued the appellant a letter entitled, “Reassignment.” California Code of Regulations, title 2, section 599.904 requires an appeal of transfer be filed with CalHR within 30 days after service of notice of transfer. The appellant filed his appeal with the State Personnel Board (SPB) on December 6, 2016. SPB did not notify the appellant until January 30, 2017 his appeal should have been filed with CalHR. On February 9, 2017, the appellant filed his appeal with CalHR.

California Code of Regulations, title 2, section 599.904 (c) allows CalHR to allow an appeal to be filed within 30 days after the end of the period in which the appeal should have been filed if good cause is shown. Although the appeal was filed after the period allowed for a late filed appeal, the Statutory Appeals Unit accepted jurisdiction on the basis of equity. Equity is “justice administered according to fairness.” (See Black’s Law Dict. (6th ed. 1990) p. 540, col. 1.) To deprive the appellant of due process because the

SPB took an inordinate amount of time to advise him of his error, would result in unfairness and deprive him of an opportunity to be heard.

II

ISSUES

The appellant argued his transfer was unlawful under Government Code Section 19994.1, and in the alternative, was for the purpose of harassment or discipline under Government Code section 19994.3.

The respondent claimed an appointing power may transfer an employee under Government Code section 19994.1 and did not transfer the appellant for the purpose of harassment or discipline under Government Code section 19994.3.

The issues to be determined are:

1. Was the involuntary transfer of appellant unlawful under Government Code section 19994.1?
2. Was the involuntary transfer of appellant made for the purpose of harassment or discipline in violation of Government Code section 19994.3?

III

FINDINGS OF FACT

The evidence established the following facts by a preponderance of the evidence.

The appellant began his career with the State of California on June 6, 1994. His most recent appointment was to the classification of Health Program Manager III (HPM III). He is an excluded employee assigned to respondent's Dental Program at Folsom State Prison. His supervisor is the Chief Executive Officer (CEO) of Health Care Operations.

On November 7, 2016, the respondent notified the appellant in writing he was being transferred. The first two paragraphs of the letter read as follows:

> "This letter is to notify you that you are being transferred from your current physical work location at Folsom State Prison (FSP), 300 Prison Road, Represa, CA to Deuel Vocational Institution (DVI) located at 23500 Kasson Road, Tracy CA. Your classification as Health Program Manager III will remain the same.

> This letter will serve as your 60 day notice that you are being permanently reassigned to DVI in Tracy. Pursuant to Government Code Section 19994.1 *'(a) An appointing power may transfer any employee under his or her jurisdiction: (1) to another position in the same class; or (2) from one location to another whether in the same position or . . .'"* [Emphasis in original.]

The ALJ took Official Notice of Government Code section 19994.1 (b) which states,

> "When a transfer under this section or Section 19050.5 reasonably requires an employee to change his or her place of residence, the appointing power shall give the employee, unless the employee waives this right, a written notice of transfer 60 days in advance of the effective date of the transfer. Unless the employee waives this right, the appointing power shall provide to the employee 60 days prior to the effective date of the transfer a written notice setting forth in clear and concise language the reasons why the employee is being transferred."

The appellant did not waive his right to written notice of transfer. Respondent's transfer letter to the appellant did not indicate the reasons for the transfer.

The appellant's supervisor testified she has supervised the appellant since 2006 and did not initiate his transfer. She was on vacation and the Region II Regional Dental Director (Dental Director) initiated the appellant's transfer. When she returned from vacation, she signed the transfer letter based on the information she received from the Dental Director. He told her the appellant's skill set as an HPM III was needed at DVI, and another CEO wanted him at DVI based upon his past work experience and skill set in dental management.

The appellant's supervisor does not know who drafted the transfer letter but was advised that, "the notice was required and was in accordance with regulations." The appellant has no record of discipline or any problems with conduct or behavior and she had no reason to discipline, harass or otherwise retaliate against him.

The Northern Region Personnel Administrator, does not know who drafted the appellant's transfer letter. He indicated respondent's Human Resource's office follows the "relocation rule." That "rule" requires to "qualify for relocation," the new headquarters must be a distance of 50 miles plus the appellant's original commute in order for

relocation expenses to be paid.[1] According to him, the appellant needed "67 miles and some change" in order to qualify for relocation expenses.

As Program Manager of respondent's Dental Department, the appellant's performance metrics were in the 98 – 99 percentile. The performance metrics indicate he was doing a good job which was also reflected in his most recent performance appraisal. The appellant's supervisor testified the appellant's transfer was for "organizational and business needs," but could not explain those "organizational and business needs," as she was not made aware why it was necessary to transfer the appellant to DVI and transfer the DVI HPM III to FSP.

The DVI HPM III also had good performance metrics and no issues with discipline. As the hiring authority for all staff, the appellant's supervisor believed the performance of appellant and the other HPM III "were just about the same." There was no evidence presented as to who authored the appellant's transfer letter or who made the decision to provide a 60-day notice as required by Government Code section 19994.1. the Dental Director and DVI CEO did not testify.

IV

ANALYSIS

"[E]xcept as otherwise provided by law, a party has the burden of proof as to each fact the existence or nonexistence of which is essential to the claim for relief or defense that [he] is asserting." (Evid. Code, § 500.) The appellant has the burden to prove he was unlawfully transferred by the respondent. (*Aguilar v. Atlantic Richfield* (2001) 25 Cal.4th 826.)

Appellant was unlawfully transferred under Government Code section 19994.1 (a).

"An appointing power may transfer any employee under its jurisdiction: (1) to another position in the same class; or (2) from one location to another whether in the same position, or in a different position as specified in (1) or in Section 19050.5."

[1] Prior to the Northern Region Personnel Administrator, the ALJ took Official Notice of two Google Maps prepared during the hearing. The appellant's residence in Rancho Murrieta is 17.5 miles from his old headquarters and 68 – 75 miles from his new headquarters depending on the route taken.

(Gov. Code, § 19994.1 (a).) Government Code section 19050.5 states, "[n]otwithstanding Section 3517.6, an appointing power may transfer any employee under his or her jurisdiction to a position in a different class pursuant to board rule."

Government Code section 19994.1 (b) provides: "[w]hen a transfer under this section or Section 19050.5 reasonably requires an employee to change his or her place of residence, the appointing power shall give the employee, unless the employee waives this right, a written notice of transfer 60 days in advance of the effective date of the transfer. Unless the employee waives this right, the appointing power shall provide to the employee 60 days prior to the effective date of the transfer a written notice setting forth in clear and concise language the reasons why the employee is being transferred." [Emphasis added.] The appellant did not waive his right to written notice of transfer, and the notice provided by respondent did not provide a reason for the transfer.

None of respondent's witnesses who testified at the hearing knew who drafted the transfer letter provided to the appellant. The appellant's supervisor testified, "the notice was required and was in accordance with regulations." Specifically, "as a state employee working within regulations as well as within union when we effect a change on somebody's employees, notice is required." She was not aware clear and concise reasons for the transfer were also required to be included in the transfer letter.

By virtue of its November 7, 2016 "Reassignment" letter to the appellant, the respondent made the determination he was entitled to a 60-day notice in accordance with Government Code section 19994.1 (b). However, it is axiomatic that respondent's failure to articulate the reasons for the transfer as required by section 19994.1 (b) renders the transfer notice to the appellant defective. A defective notice is "lacking in some particular which is essential to the completeness, legal sufficiency." (See Black's Law Dict. (6th ed. 1990) p. 418, col. 2.)

By providing the appellant with a 60-day notice, the respondent had determined he could reasonably be required to change his place of residence. Thus, respondent's argument it was not required to provide a 60-day notice is not persuasive and contradicts testimony of appellant's supervisor. Appellant's supervisor testified "the notice was required and in accordance with regulations." Similarly, respondent's argument its version of Google Maps indicating the appellant did not meet the mileage threshold of 50 miles is unpersuasive and moot. It is moot because the mileage determination had been

made and therefore has no practical effect on the controversy of whether a 60-day notice was required.

In other words, by providing the appellant with a 60-day notice, the respondent had made the decision he was entitled to the Government Code section 19994.1 notice. However, by failing to set forth in clear and concise language the reasons why the appellant was being transferred, respondent did not follow the statutory requirements of Government Code section 19994.1. Because respondent failed to provide proper notice to the appellant, he was unlawfully transferred under section 19994.1, and he is entitled to compensation.

To be compensated for relocation expenses, "the move must be a minimum of 50 miles plus the number of miles between the old residence and the old headquarters." (CCR, tit. 2, § 599.714.1 (b)(2).) The appellant's residence in Rancho Murrieta is 17.5 miles from his old headquarters, and 68 – 75 miles from his new headquarters depending on the route taken. Based on the "relocation rule" explained by the Northern Region Personnel Administrator, the appellant met the requirements for relocation expenses. Although the appellant did not relocate, he is entitled to mileage reimbursement in excess of his original commute miles prior to the unlawful transfer.

Appellant was not unlawfully transferred under Government Code section 19994.3.

Government Code section 19994.3 prohibits transfers "made for the purpose of harassing or disciplining the employee." Harassment is a "course of conduct directed at a specific person that causes substantial emotional distress in such person and serves no legitimate purpose." (See Black's Law Dict. (6th ed. 1990) p. 717, col. 1.) Discipline is defined as correction, chastisement, punishment, penalty." (See Black's Law Dict. (6th ed. 1990) p. 464, col. 1.)

CalHR has the authority to revoke a transfer and restore an employee to his original position if it finds the transfer was made for the purpose of harassing or disciplining the employee. The appellant's supervisor testified he was a good employee with performance metrics in the 98 – 99 percentile. Moreover, she never retaliated or otherwise harassed the appellant and had no reason to discipline him. The appellant failed to show how the respondent harassed or otherwise disciplined him by transferring him to DVI.

V

CONCLUSIONS OF LAW

Appellant proved by a preponderance of the evidence he was unlawfully transferred under Government Code section 19994.1. Appellant failed to prove his involuntary transfer of November 7, 2016 was for the purpose of harassment or discipline in violation of Government Code section 19994.3.

* * * * *

THEREFORE, IT IS DETERMINED, the appeal of transfer effective January 7, 2017 is hereby granted. The appellant shall be returned to his former position at Folsom State Prison within two weeks of this order and the equivalent mileage reimbursement for any miles he was required to travel in excess of his original commute from the date of transfer.